

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KENNETH LYNN MOORE,

No C-14-1370 TEH (PR)

Plaintiff,

ORDER OF DISMISSAL

v.

KAMALA D. HARRIS, et al.,

Defendants.

_____ /

Plaintiff, an inmate at California State Prison - Solano, filed this pro se civil action under 42 U.S.C. § 1983, seeking the release and testing of potentially exculpatory biological evidence in the possession and control of officers of the State of California, Alameda County, and Santa Clara County. Plaintiff's original complaint was dismissed with leave to amend and he has filed an amended complaint.

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Plaintiff is currently serving a life sentence imposed by the Alameda County Superior Court in 1980 after he and his brother, David Moore, were convicted of serious crimes arising from ten separate incidents that occurred in Northern California in August 1978. Among the offenses for which both Plaintiff and his brother were convicted was the rape of "Linda S." in a San Jose motel room on August 11, 1978. Although Plaintiff now admits to having committed one of the offenses for which he was tried and convicted,

1 the theft of a pickup truck from a Los Altos, California auto
2 dealership, he maintains that he is innocent of the remaining
3 offenses, including the rape of Linda S.

4 Seeking to establish his innocence, Plaintiff brought a
5 prior action in this court, Moore v. Lockyer, Case No. C 04-1952
6 MHP, seeking the release of DNA evidence collected by Santa Clara
7 County during the course of the investigation into Linda S.'s rape.
8 On September 23, 2005, this court dismissed the prior action under
9 California's issue preclusion law, finding that the state court, in
10 2002, had already determined there was no reasonable probability
11 that access to DNA evidence would have affected the outcome of
12 Plaintiff's criminal proceedings. The Ninth Circuit Court of
13 Appeals affirmed. Moore v. Brown, No. 06-15016, 2008 WL 4430338
14 (unpublished memorandum disposition).

15 Plaintiff states that he does not, by way of the instant
16 action, attempt to re-litigate the claims in his earlier federal
17 court action. Rather, Plaintiff states that the claims herein are
18 based on events that occurred subsequent to the conclusion of his
19 earlier action.

20 Specifically, Plaintiff alleges that in early 2012 he
21 obtained pro bono counsel, Kelley Fleming. Ms. Fleming secured a
22 verbal agreement with the Santa Clara County Crime Laboratory
23 ("SCCCL") to test a DNA swab collected from Linda S. in 1978,
24 following the rape. Plaintiff alleges the swab was tested in June
25 2012, revealing DNA from three individuals - two male, and one
26 female. When compared against the DNA samples extracted from
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1 Plaintiff, he was eliminated as a contributor; however, so was the
2 victim.

3 Plaintiff alleges that these findings "created a dilemma"
4 for SCCCL and "sparked much debate between [Plaintiff's counsel] and
5 SCCCL staff attorneys and lab technicians." Plaintiff further
6 alleges that in the subsequent months, SCCCL refused to meet and
7 confer with Plaintiff's counsel and "abruptly canceled any further
8 meetings." According to the complaint, "defendants at SCCCL
9 verbally admitted [] that they tested the wrong evidence."

10 Plaintiff alleges that the only logical inference is that there has
11 been "tampering" or "falsification/fabrication" of the DNA swab.

12 Plaintiff also refers to requests for appointment of
13 counsel he made in Alameda County Superior Court in February 2013
14 and June 2013. Both were decided by Alameda County Superior Court
15 Judge Larry J. Goodman, who also decided Plaintiff's 2002 state
16 court action seeking access to DNA evidence, as mentioned above.
17 Plaintiff states that Judge Goodman approved his June 2013 request
18 for counsel in state court. Plaintiff offers no further information
19 on the status of any current state court proceedings.

20 Plaintiff alleges that the DNA testing that was done was
21 not properly done, that some evidence was lost or contaminated, and
22 that other pieces of evidence should have been tested. Plaintiff
23 claims that Defendants' failure to properly test and/or release the
24 biological evidence in his criminal case violates his Fourteenth
25 Amendment right to due process and equal protection. Plaintiff also
26 alleges state law violations.

1 Murphy, 844 F.2d 628, 634 (9th Cir. 1988); Harris v. City of
2 Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981). A person deprives
3 another of a constitutional right within the meaning of § 1983 if he
4 does an affirmative act, participates in another's affirmative act
5 or omits to perform an act which he is legally required to do, that
6 causes the deprivation of which the plaintiff complains. Leer, 844
7 F.2d at 633.

8 B

9 Plaintiff alleges an equal protection violation by asserting
10 that Defendants acted to deprive Plaintiff of access to evidence and
11 proper DNA testing specifically because Plaintiff is African-
12 American. "The Equal Protection Clause of the Fourteenth Amendment
13 commands that no State shall 'deny to any person within its
14 jurisdiction the equal protection of the laws,' which is essentially
15 a direction that all persons similarly situated should be treated
16 alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432,
17 439 (1985) (quoting Plyler v. Doe, 457 U.S. 202, 216 (1982)). A
18 plaintiff alleging denial of equal protection under section 1983,
19 therefore, must prove purposeful discrimination by demonstrating
20 that he "receiv[ed] different treatment from that received by others
21 similarly situated" and that the treatment complained of was under
22 color of state law. Van Pool v. City and County of San Francisco,
23 752 F. Supp. 915, 927 (N.D. Cal. 1990) (citations omitted).

24 Plaintiff was provided leave to amend because he only
25 presented conclusory allegations of Defendants' alleged race bias
26 and American racial history. There were no allegation or indication
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1 that Plaintiff was treated differently from other similarly situated
2 individuals. Plaintiff has failed to cure these deficiencies in the
3 amended complaint. Plaintiff again only presents brief conclusory
4 allegations that there was an equal protection violation because he
5 is African-American but fails to describe how other similarly
6 situated individuals were treated differently.

7 In order to state a claim a complaint "does not need
8 detailed factual allegations, . . . a plaintiff's obligation to
9 provide the 'grounds' of his 'entitle[ment] to relief' requires more
10 than labels and conclusions, and a formulaic recitation of the
11 elements of a cause of action will not do. . . . Factual
12 allegations must be enough to raise a right to relief above the
13 speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544,
14 555 (2007) (citations omitted). A complaint must proffer "enough
15 facts to state a claim to relief that is plausible on its face."
16 Id. at 570. The United States Supreme Court has explained the
17 "plausible on its face" standard of Twombly: "While legal
18 conclusions can provide the framework of a complaint, they must be
19 supported by factual allegations. When there are well-pleaded
20 factual allegations, a court should assume their veracity and then
21 determine whether they plausibly give rise to an entitlement to
22 relief." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

23 Plaintiff's brief allegations without support do not plausibly
24 demonstrate an equal protection violation. Therefore, the claim is
25 dismissed. Because Plaintiff has already been provided leave to
26 amend and because allowing further amendment would be futile, this
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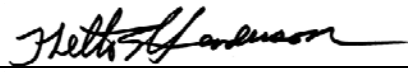
1 claim is dismissed with prejudice.¹

2 III

3 For the reasons set forth above, Plaintiff's complaint is
4 DISMISSED with prejudice for failure to state a claim. The clerk
5 should deny all pending motions as moot and close the file.

6 IT IS SO ORDERED.

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9 DATED 03/11/2015



THELTON E. HENDERSON
United States District Judge

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26 ¹ The Court denies Plaintiff's request to take judicial notice
27 of the articles attached to his supplemental brief. The articles do
28 no relate to his allegations of an equal protection violation
regarding the DNA testing.